

## **KNOWINGLY MAKING FALSE STATEMENTS TO OBTAIN A CONTRACT-VOID AB INITIO REDUX**

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It is a basic principle of contract law, discussed previously in these blogs, that a contract tainted by fraud or wrongdoing is void *ab initio*, i.e, void from the very beginning. If a contractor knowingly makes a material false statement which the agency relies upon, the contract will be deemed void by the Boards or the courts. Another good example of this principle is in *Bryan Concrete & Excavation, Inc.*, CBCA 2882, August 26, 2012.

In *Bryan*, the Department of Veterans Affairs awarded a contract to upgrade a chiller at a Department of Veterans Affairs (“VA”) medical facility. The contract was set aside 100 percent for eligible Service Disabled Veterans Owned Small Businesses (“SDVOSB”). (Eligible SDVOSBs must have not less than 51 percent of the business owned by one or more service disabled veterans, or have not less than 51 percent of its publicly owned stock controlled by one or more service disabled veterans or, in the case of a veteran with a permanent and severe disability, a spouse or permanent caregiver. 38 C.F.R. §74.1. Furthermore, the ownership must be unconditional, and veterans or service disabled veterans must exercise control of both day to day management and long term decision making authority of the business. (38 C.F.R. §74.3, 74.4.)).

After problems occurred during Bryan’s performance, the VA contracting officer terminated the contract for default. During an appeal of the default, VA discovered that Bryan had entered into a teaming agreement with an individual (who was not a service-disabled veteran) through which that person took over management and control of Bryan. As a result of the teaming agreement, Bryan did not meet the eligibility requirements for SDVOSB contracts. In the appeal, VA asserted that the contract was void *ab initio*, and the Board agreed.

The VA showed that Bryan obtained the contract through a material misrepresentation of its eligibility to bid on an SDVOSB set aside contract at the VA with the intention of obtaining the contract, and the VA relied on Bryan’s misrepresentation in awarding the contract. While litigating at the Board, Bryan attempted to enforce a new and different contract but the Board refused to even consider the illegal contract. The Board noted that no tribunal of law would lend its assistance to carry out the terms of an illegally obtained contract.

The takeaway is simple: make no material misrepresentations (such as small business or SDVOSB eligibility) in order to obtain a contract, or that contract may be voided if and when the misrepresentations are discovered. Even if a contractor is correct in its appeal of a default for lack of satisfactory performance, the misrepresentation will void the contract.